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No. 87-

IN THE

Supreme Court of the United States

October Term, 1987

DAVID LAWRENCE KAHN,

Petitioner,

vs.

AVNET, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether an individual whose civil rights are violated as defined in 42 U.S.C. §1985(2) by a conspiracy among his corporate employer and officers and subsidiaries thereof is barred from asserting a claim pursuant to 42 U.S.C. §1985(2) by the "intracorporate conspiracy" doctrine.

2. Whether a complaint alleging that an individual's civil rights were violated by a conspiracy among a corporation, officers thereof, and others who will become known during discovery may properly be dismissed for failure to state a claim upon which relief can be granted pursuant to 42 U.S.C. §1985.

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Petitioner David Lawrence Kahn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on January 27, 1988.

OPINIONS BELOW

The January 27, 1988 opinion ("the Opinion") of the United States Court of Appeals for the Second Circuit is appended as Appendix A. The Opinion was not reported. The unreported order of March 10, 1988 denying rehearing is appended as Appendix B. The unreported Order of February 22, 1982 of the United States District Court for the Central District of California dismissing Count I of the First Amended Complaint is appended as Appendix C.

JURISDICTION

The Opinion of the Court of Appeals was filed January 27, 1988. The Court denied petitioners' petition for rehearing on March 10, 1988, and this petition for a writ of certiorari was filed within ninety (90) days of that date. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. §1985 provides, in pertinent part:

. . .

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object

of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This is an action by plaintiff David Kahn ("Kahn") against defendant Avnet, Inc. ("Avnet"), his former employer, for conspiracy in violation of the Federal Civil Rights Act, fraud and several other claims. This action arises from Avnet's discharge of Kahn from his position as corporate counsel and assistant to the president.

In June 1978, Kahn came across an incriminating document in the course of complying with a discovery order issued by a federal court during the course of a lawsuit in which Avnet was a party (the "Dekalb action"). Upon reviewing the document, Kahn realized that the document was within the scope of documents which were subject to the federal court order. Kahn informed Avnet officers, including Avnet's president, Simon Sheib ("Sheib"), and its vice president, William Scharffenberger ("Scharffenberger"), that he had discovered the incriminating document.

Kahn contends that Sheib and Scharffenberger, as well as Avnet, its DNA division, its DNA, Inc. subsidiary ("DNA"), Sheib, Scharffenberger, and others conspired to threaten Kahn that if he did not lose or destroy the incriminating document, he would be discharged from his position as corporate counsel and assistant to the president. Kahn refused to comply with the instruction that he destroy the document. Kahn further contends that when he refused to lose or destroy the document, he was fired by Avnet for refusing to do so.

Had Kahn destroyed or lost the document, he clearly would have committed an illegal and unethical act. Additionally, Kahn would have had to sign a perjurious affidavit stating that he had produced all documents responsive to the document request and would have had to

perjure himself again when deposed or called as a witness in the then pending federal court action.

Kahn was, in fact, deposed in the Dekalb action but was prevented from testifying about the circumstances of his firing when Avnet asserted the attorney-client privilege.

Kahn filed the original complaint in this action on July 2, 1981 in the United States District Court, Central District of California.[1/] Jurisdiction was grounded upon diversity of citizenship and the existence of a federal question.

On October 19, 1981, Kahn filed his First Amended Complaint[2/] in which he asserted as Count I a claim for violation of 42 U.S.C. 1985, subdivision (2).[3/] Kahn alleged that he was employed by Avnet between November 1, 1976 and July 5, 1978 as corporate counsel. He further alleged that Avnet, a New York corporation, had a separate division and a separate subsidiary corporation, both of which were named Diversified Numeric Applications ("DNA"). DNA engaged in the business of designing and/or installing computer systems for hospitals and medical laboratories. In 1978, Avnet decided to terminate DNA's business because of its lack of profitability. At or about the same time, one of DNA's customers, Dekalb County Hospital Authority ("Dekalb") filed an action (the "Dekalb action") for breach of contract against Avnet and DNA in a federal court in Georgia. Specifically, Dekalb alleged that Avnet had failed to provide Dekalb adequate assurances of performance under its contract.

The Complaint alleged that a court order in the Dekalb action required that Avnet produce certain documents. Kahn was placed in charge of supervising Avnet's production of documents. While supervising the

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1/ JA 10. As used herein, JA refers to the Joint Appendix filed with the Court of Appeals. RT refers to the Reporter's Transcript, which was included in its entirety as Volume IV of the Joint Appendix.

2/ Hereinafter "the Complaint."

3/ JA 18. The First Amended Complaint is appended hereto as Appendix D.

production of documents during discovery in the Dekalb action, Kahn discovered an incriminating memorandum [the "Selner memorandum"] from the general manager of DNA [Michael Selner] to Avnet's senior vice-president in New York, stating that in Selner's opinion, DNA did not have the capability to complete the contract with Dekalb. Kahn then reported to Avnet's senior vice president in New York [Scharffenberger] that he had discovered the Selner memorandum. Scharffenberger in turn informed Sheib, of the discovery.

Thereafter, Scharffenberger, after consulting with Sheib, instructed Kahn to "lose the document." Sheib, acting on behalf of himself, and of Avnet, Inc. and DNA, Inc., also informed Kahn that he should "lose" the Selner memorandum. Kahn informed Scharffenberger and Sheib that he could not and would not lose the document because it would violate the law, be in contempt of court, and would be unethical. Sheib then told Kahn that if he did not "lose" the memo, he would be fired. When Kahn refused to destroy the memo, he was immediately terminated as an employee of Avnet.

Kahn alleged that in threatening him with discharge and discharging him for refusing to destroy the Selner memo, Avnet violated 42 U.S.C. 1985 in that Kahn, who would have had to execute a perjurious affidavit in conjunction with the document production and who was involved in the negotiations between Avnet and Dekalb, would have been called as a witness in the Dekalb action.[4/] The complaint pleaded that not only Avnet, but its president (Sheib), DNA "and additional parties (who will become known during discovery)" had violated §1985 by these actions.

In an order dated February 19, 1982 (JA 221), the court, ruling in a motion to dismiss by Avnet (JA 31), ordered, inter alia, that Count I of the First Amended Complaint, for violation of 42 U.S.C. 1985(2), be dismissed on the grounds that Kahn failed to allege a conspiracy between "two or more persons" required by section 1985. Certain other claims were also dismissed.

4/ Kahn was in fact deposed during the course of the DeKalb litigation. (JA 779).

Some claims for relief not pertinent to this petition remained in the Complaint. The action was subsequently transferred, pursuant to 28 U.S.C. §1404(a), to the United States District Court for the Southern District of New York. Trial on claims other than the previously dismissed §1985(2) claim was held in April, 1987.

At trial, for the first time in the litigation, Avnet admitted that Kahn was not discharged for just cause. As a result of this untimely concession, Avnet was able to persuade the trial court to bar all evidence of the circumstances of Kahn's discharge, including his refusal to follow instructions to destroy evidence. Because the court also barred all evidence that at the time of his discharge he had complained that he was being fired for refusing to destroy evidence and commit perjury, Avnet was also able to make an effective argument to the jury that Kahn had subsequently fabricated his claims.

The court dismissed certain of the claims at trial and the jury returned a verdict for Avnet on the remaining claims.

Kahn appealed to the United States Court of Appeals for the Second Circuit, assigning as error not only the dismissal of Count I of the First Amended Complaint, but also a number of other pretrial and trial errors. The Court of Appeals affirmed the judgment.[5/] Briefly addressing whether the §1985 claim had been properly dismissed, the court observed that the Second Circuit applied the "intracorporate conspiracy" doctrine to §1985 actions, denying claims of conspiracy involving a corporation and its subsidiaries and/or officers because all are treated as one person. Acknowledging that the doctrine "springs from the antitrust area," the court nevertheless observed that it recognized no distinction to its application between antitrust and civil rights cases. The Court also affirmed the rulings below in all other respects.

Kahn petitioned for rehearing en banc. The petition was denied on March 10, 1988.

5/ The opinion of the Court of Appeals is appended as Appendix A.

REASONS FOR GRANTING THE WRIT

I

The Intracorporate Conspiracy Doctrine Should Not Be Imported from Antitrust Law Into Civil Rights Law

A. There is a Conflict Among the Circuits

In this civil rights action pursuant to 42 U.S.C. §1985(2), plaintiff alleges a conspiracy to violate his civil rights by a corporation, officers and subsidiaries thereof, and others whose identities would become known during discovery. The courts below held that because plaintiff had alleged nothing more than an "intracorporate conspiracy," the Complaint failed to plead an actionable conspiracy under §1985.

The Court of Appeals' holding was consistent with the Second Circuit's prior case law which applied the intracorporate conspiracy doctrine to civil rights cases. The Court relied upon *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978), where it had in turn followed its earlier precedent of *Girard v. 94th and Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir. 1976), which applied "the familiar doctrine that there is no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment." *Hermann*, 576 F.2d at 459.

While some circuits have adopted the same approach to the intracorporate conspiracy doctrine in civil rights cases, other circuits have rejected it. Thus, the First and Third Circuits have refused to apply the intracorporate conspiracy doctrine in civil rights actions,[6/] and the Fifth

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6/ *Novotny v. Great American Fed.Savings & Loan Assn.*, 584 F.2d 1235, 1256-59 (3d Cir. 1978) (en banc), *rev'd on other grounds*, 442 U.S. 366 (1979); *Stathos v. Bowden*, 728 F.2d 15, 20-21 (1st Cir. 1984).

and Eleventh Circuits have expressed the view that the doctrine has no place outside of antitrust laws, where it originally developed.[7] In contrast, the Fourth, Sixth, Seventh and Eighth Circuits have joined the Second Circuit in its expansive approach to the doctrine.[8] The Ninth Circuit has expressly declined to decide which camp to join.[9] *See Rebel Van Lines v. City of Compton*, 663 F. Supp. 786, 790-791 (C.D. Cal. 1987), where Judge Pfaelzer analyzed the positions of the various circuits and concluded that the intracorporate conspiracy doctrine should not be applied in civil rights cases.

There is thus a conflict in the circuits which is ripe for resolution by this Court.

B. There Is No Justification for Extending the Intracorporate Conspiracy Doctrine to Bar Civil Rights Actions

42 U.S.C. §1985(2) provides that when "*two or more persons* in any State or Territory *conspire* to deter, by force, intimidation, or threat," one's testimony in a court of the United States, one may recover damages if one is injured thereby.

By its own terms, §1985 does not restrict actionable conspiracies to those involving only private individuals without any corporate affiliation. Yet the court below adopted such a restriction in affirming the dismissal of plaintiff's §1985 claim.

The doctrine that intracorporate conspiracies are not actionable as conspiracies was first enunciated by the Fifth Circuit in *Nelson Radio & Supply Co. v. Motorola, Inc.*,

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7/ *United States v. Hartley*, 678 F.2d 961, 971-72 (11th Cir. 1982); *Dussouy v. Gulf Coast Coast Investment Corp.*, 660 F.2d 594, 603 (5th Cir. 1981).

8/ *Girard, supra; Buschi v. Kirven*, 775 F.2d 1240, 1251-52 (4th Cir. 1985); *Doherty v. American Motors Corp.*, 728 F.2d 334, 339-40 (6th Cir. 1984); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974).

9/ *Padway v. Palches*, 665 F.2d 965, 968-69 (9th Cir. 1982).

200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). In *Nelson*, the Fifth Circuit held that for purposes of a civil antitrust claim pursuant to the Sherman Act, a conspiracy among a corporation and its officers and managing agents is not an actionable conspiracy.

The Fifth Circuit subsequently criticized the *Nelson* rule and refused to apply it outside the federal antitrust context in *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 603 (5th Cir. 1981). The court noted several objections to the rule: (1) it does not serve its purported goals of enabling corporations to act, permitting the pooling of resources to achieve social benefits, and requiring a corporation to bear the costs of its business enterprise, (2) it is inconsistent with the rule that a corporation can be convicted of criminal charges of conspiracy based solely on conspiracy with its own employees, and (3) an incorporated group of individuals creates the "group danger" at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose. *Dussouy*, 660 F.2d at 603. The Fifth Circuit therefore permitted a claim of conspiracy to go forward under Louisiana antitrust law despite the fact that the conspiracy was intracorporate.

The Eleventh Circuit also rejected the *Nelson* rule (originally enunciated by its predecessor court) in the criminal context in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982). The court noted that the theory barring intracorporate conspiracies was based upon the fiction that because a corporation is personified by the acts of its agents, those acts therefore become the acts of the corporation as a single entity. The purpose of this fiction is to force the corporation to answer for its acts and to shoulder financial responsibility. The court observed that the fiction was never intended to allow the corporation or its agents to hide behind the identity of the other. The court concluded: "We decline to *expand* the fiction only to *limit* corporate responsibility in the context of the criminal conspiracy now before us." *Hartley*, 678 F.23d at 970 (emphasis in original).

Addressing *Nelson*, *Hartley* observed that "[a]ntitrust litigation is a peculiar form of legal action." The court

noted that section one of the Sherman Act, in referring to conspiracies "in restraint of trade," implies a requirement of multiple entities. In contrast, section two's prohibition of monopolies aims at a single conglomeration. Thus, "[i]f section one's conspiracy charge was satisfied by a single corporate entity, it would arguably render section two meaningless." *Id.* at 971. Outside the antitrust context, however, the court found little to justify the rule. Joining the Fifth Circuit's ruling in *Dussouy*, the court held that "it is possible for a corporation to conspire with its own officers, agents and employees in violation of 18 U.S.C. §371." *Id.* at 972.

This court has accepted the *Nelson* rule, but only in the federal antitrust context. In doing so, it has echoed the rationale of *Hartley*. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court held that a parent corporation and its wholly owned subsidiary are legally incapable of conspiring under section 1 of the Sherman Act. However, the Court's reasoning was specifically based upon the language of the Sherman Act and policies underlying *antitrust* law, but not upon the law of conspiracy.

In fact, the Court observed that nothing in the literal meaning of section 1's terms "contract, combination, or conspiracy" excludes coordinated conduct among officers or employees of the same company.[10/] It is only when the "antitrust dangers that § 1 was designed to police,"[11/] are considered that "conspiracy" must be interpreted narrowly.

> "The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business

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10/ 467 U.S. at 679; *see also id.* n.15.

11/ 467 U.S. at 769.

> enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." *Id.*

Similarly, the Court rejected an intracorporate conspiracy between a corporation and its subsidiary or division "[b]ecause coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests." *Id.* at 770-771.

Thus, the Court has implicitly joined those courts of appeals which reject the *Nelson* rule outside the antitrust context, for the Court's rationale in *Copperweld* was based entirely upon antitrust policy and was admittedly contrary to the plain meaning of conspiracy.

In *Copperweld,* the Court recognized that "[e]ven today courts disagree whether corporate employees can conspire with themselves or with the corporation for purposes of certain statutes, such as 42 U.S.C. §1985(3)." *Id.* at 775 n.24 (citing *Novotny* and *Dombrowski*). While this Court has not yet had to confront the question outside the antitrust context, the split among the circuits and the lack of powerful policy reasons for the *Nelson* doctrine outside the antitrust context offer compelling reasons to decide the issue now.

The two courts of appeals that have held that intracorporate conspiracies are not barred from claims arising under 42 U.S.C. §1985 have offered powerful reasons for rejection of the *Nelson* rule in this context. In *Stathos v. Bowden,* 728 F.2d 15 (1st Cir. 1984), the First Circuit noted that the cases applying the intracorporate exception "have rested in large part on precedent drawn from the antitrust field, where considerations underlying the need for an 'intracorporate' exception to ordinary conspiracy principles are very different." The evil at which the conspiracy section of the Sherman Act aims exists "only when two different business *enterprises* join to make a decision, such a fixing a price, that in a competitive world each would take separately." 728 F.2d at 20-21.

In contrast, the First Circuit observed, where equal protection is at issue, "one cannot readily distinguish in

terms of harm between the individual conduct of one enterprise and the joint conduct of several." *Id.* at 21.

Stathos therefore expressly followed the lead of the Third Circuit in *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235 (3d Cir. 1978),(en banc), *reversed on other grounds*, 442 U.S. 366 (1979). In *Novotny*, the court examined the language of §1985 and observed that "[o]n its face, the statute requires simply that 'two or more persons' conspire in order to come within its proscription." 584 F.2d at 1257. The court found nothing in the legislative history to support a restrictive interpretation of the word "conspire." *Id.* Nor could the court find any justification of the intracorporate conspiracy bar in the general tenets of conspiracy theory. The court, citing cases from this Court,[12/] observed that it is well-settled that an employer can conspire with his employee and that a labor union can conspire with its business agent. By the same reasoning, a corporation should be able to conspire with its employees.

When this Court reversed *Novotny*, it did so on other grounds. *Great American Federal Savings & Loan Association v. Novotny* 442 U.S. 366 (1979). While it would have been an easy matter for the Court to reverse *Novotny* by applying the restrictive intracorporate conspiracy doctrine, it did not do so. In fact, the Court expressly assumed, without deciding, "that the directors of a single corporation can form a conspiracy within the meaning of § 1985(3)." 442 U.S. at 373 n.11 (1979)[13/].

As the First Circuit later did in *Stathos*, the *Novotny* court examined the purposes behind §1985 to determine

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12/ *Hyde v. United States*, 225 U.S. 347 (1912); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

13/ The Court later implicitly accepted the notion that an intracorporate conspiracy satisfies the requirements of §1985 in *Kush v. Rutledge*, 460 U.S. 719 (1983), a §1985(2) action in which all the conspirators were employees of one university. The Court upheld the plaintiff's civil rights claim, although on other grounds. The intracorporate conspiracy issue was not addressed. Presumably, however, if the Court had believed that the intracorporate conspiracy doctrine should bar such a claim, it would have been an easy matter to dismiss the action on that ground.

whether the intracorporate conspiracy exception made any sense in a civil rights context. The example used by the court illustrates the absurdity of applying the rule in this context:

> "If, as seems clear under §1985(3), the agreement of three partners to use their business to harass any blacks who register to vote constitutes an actionable conspiracy, we can perceive no function to be served by immunizing such action once a business is incorporated." 584 F.2d at 1257.

The policy of protecting witnesses from intimidation, as proscribed by §1985(2), obviously is served whether or not the conspirators work within the framework of one corporation or corporate family. The corporate context is simply irrelevant to the policies underlying §1985, in contrast to antitrust law.

Academic criticism of the intracorporate conspiracy doctrine also militates in favor of review by this Court of the decision below. Thus, in Note, *Intracorporate Conspiracies Under 42 U.S.C. Section 1985(c)*, 92 Harv.L.Rev. 470 (1978) (the "Harvard Note"), the intracorporate conspiracy exception was condemned:[14/]

> "In attributing all the officials' acts to the corporation, [the intracorporate conspiracy doctrine] ignores the societal judgment that individuals, even if agents, are generally responsible for their conduct. Founded upon the questionable proposition that the corporation should always be treated in the same way as a natural person, this view does not take full account of the collective nature of corporate activity and the notion that such collections of individual minds and wills allow precisely the group coercion against which conspiracy laws protect." *Id.* at 471.

14/ *See also* Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c): The Impact of Novotny v. Great American Federal Savings & Loan Association*, 13 Ga.L.Rev. 591, 609-612, 614-619 (1979).

The Harvard Note observes that the purpose of the "attribution" rule which treats the acts of the corporate official as those of the corporation, is to enable the corporation to produce social benefits resulting from the resources pooled into the corporate entity. Further, it represents a societal judgment that the corporate enterprise should bear the costs of the accidents and injuries caused by its employees. However, the use of the rule to deny the existence of a conspiracy "fails to facilitate business transactions and allows the corporatioan to avoid injury costs rather than bear them." *Id.* at 478.

Moreover, the Harvard Note observes that

> "in refusing to recognize the possibility of a conspiracy between corporate officials, the analysis basically absolves the individuals of responsibility for the acts committed or agreements made. In other words, not only are the acts of the official attributed to the corporation, but they are attributed solely to the corporation, and no longer to the actual actors. This approach reverses the principle, well established in both tort and criminal law, that agents remain personally responsible for their actions even in those situations where the doctrine of respondeat superior applies." *Id.*

The Harvard Note concludes that the conclusion that a conspiracy is legally impossible in the intracorporate context depends on

> "a questionable use of the corporate personality rule, which treats the corporation as an individual: '[a] corporation cannot conspire with itself any more than a private individual can.' [citing *Girard* at 436.] Such a use of the corporate personality rule subordinates the reality of the situation to the fiction. Although a lone individual cannot form the agreement essential to conspiracy liability, two officials acting on behalf of one corporation can.
>
> "Finally, the [intracorporate conspiracy rule] ignores the underlying rationale for conspiracy liability. The traditional "group danger"

> rationale for making conspiracy unlawful, though absent in the case of unilateral individual action, is present in the corporate situation. According to this theory of conspiracy liability, collective activity for unlawful purposes presents a special danger to society and thus should be actionable. Though the merits of this rationale have been questioned, its applicability to intracorporate activity seems clear." *Id.* at 477-478.

The extension of the *Nelson* rule, created in the context of antitrust law, into the civil rights law is wrong, primarily for the following reasons:

(1) The antitrust law's prohibition of conspiracies and restraint of trade was primarily designed to prevent illicit collaboration by *independent* "economic units." Conduct proscribed by the antitrust laws such as price-fixing and group boycotts inherently require participation of more than one business entity to be effective. Section 1985, conversely, was clearly aimed at regulating the behavior of *individuals*, whether they be acting within or outside the scope of their employment. Clearly, two or more employees of one corporation can obstruct justice no differently than two individuals who do not happen to have a common employer. *See* Harvard Note at 480-481.

(2) One justification for the *Nelson* rule within the antitrust context is based on statutory construction and is inapplicable to section 1985. "Admitting that in some cases intracorporate agreements may unreasonably restrain trade and thus fall within the language of section 1 [of the Sherman Act], [the intracorporate conspiracy doctrine] concludes that to apply that section to such agreements would render meaningless the conspiracy clause of section 2 [of the Sherman Act], which, directed at monopolistic rather than collaborative behavior, was intended to regulate conduct within a single economic unit. Yet this argument does not apply to [section 1985] for it is the only section of the Civil Rights Act of 1871 that imposes civil liability upon private defendants who effect civil rights deprivations." Harvard Note, at 481.

(3) The dual rationale underlying the *Nelson* rule is (a) to provide "meaningful consultation between corporate employees necessary for informed economic decisions" and (b) to mitigate unfairness when subordinate employees act in compliance with a superior's instructions to do an illegal act, but do not know that the act is illegal or that the superior had an unlawful purpose. Harv. Note, p. 481. This dual rationale is persuasive in the context of economic decisions impacting antitrust law, where "the line between highly competitive, permissible conduct and over-competitive, illegal behavior is quite blurred." *Id.* Within the realm of civil rights laws, the stated rationale is inapplicable. As relates to the obstruction of justice, "the ease with which corporate officials can distinguish between legal and illegal conduct . . . militates against a strict rule of de facto immunity in the civil rights context." *Id.* at 482.

As for the policy of maintaining a free flow of information within the corporate body, one would be hard pressed to imagine *legitimate* intracorporate communications which, unprotected by the intracorporate conspiracy doctrine, would subject employees and the corporation to liability for attempting to influence a federal court proceeding. By definition, section 1985(2) proscribes conspiracies undertaken with the intent to deter voluntary and truthful testimony by force or intimidation.

In this action, to apply the intracorporate conspiracy doctrine would be to condone Avnet's dismissal of Kahn based *solely on his refusal to commit an illegal act*. This is not the purpose for which the doctrine was created.

C. Certiorari Should Be Granted on this Issue

As is set forth above, the statutory language, legislative history, and rationale behind 42 U.S.C. §1985 all support an interpretation that would include intracorporate conspiracies as actionable conspiracies thereunder. Academic criticism, the well-reasoned criticism of several courts, and this Court's treatment of the issue lend further support to actionability.

Accordingly, Kahn respectfully urges that this Court grant a writ of certiorari to determine whether suits brought

under section 1985(2) are governed by the harsh confines of the intracorporate conspiracy doctrine, or whether Kahn's allegation of a conspiracy between Avnet and Sheib, or alternatively, between Sheib and Scharffenberger, is adequate to meet the threshold requirement of a conspiracy under section 1985.

II

A Complaint Alleging a Conspiracy Among a Corporation, Its Officers and Additional Parties States A Claim Upon Which Relief Can Be Granted

It must be emphasized that the District Court held that the intracorporate conspiracy doctrine barred plaintiffs' civil rights claim at the *pleading* stage when it granted Avnet's motion pursuant to Rule 12(b)(6), F.R.Civ.P.

The Complaint[15/] adequately alleged a conspiracy under 42 U.S.C. §1985(2). Specifically, paragraph 16 alleged:

> "The actions of Avnet, Diversified Numeric Applications, Inc., the President of Avnet and additional parties (who will become known during discovery) in ordering David Kahn to testify falsely in the Dekalb action in an affidavit covering the production of documents, in answering certain interrogatories, in not producing the memorandum, and in threatening to discharge, and discharging, David Kahn for refusing to follow such orders gives David Kahn the right to recover damages pursuant to 42 U.S.C. 1985(2). ..."

The Complaint thus alleged a conspiracy among Sheib [Avnet's president], Avnet, DNA, *and additional parties whose identities would become known during discovery.* Paragraph 11 of the Complaint also implicated Avnet's senior vice president [Scharffenberger] in the conspiracy.

Given the liberal rules of pleading under the Federal Rules of Civil Procedure, and given the fact that the

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15/ Appendix D hereto.

procedural posture at the time of the dismissal of the claim was an attack on the pleading, it was clearly error for the District Court to dismiss the civil rights conspiracy claim.

"A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Indeed, it must appear "beyond doubt" that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Complaint herein met the foregoing requirements. It alleged a conspiracy, not only among Avnet and its officers and subsidiaries, but also among additional parties whose identities would become known during discovery. Thus, even if intracorporate conspiracies are not actionable pursuant to 42 U.S.C. §1985, the Complaint pleaded more than an intracorporate conspiracy: it alleged that additional parties beyond the corporation and its officers conspired to deprive plaintiff of his civil rights.

While the Complaint did not specifically identify the additional parties, it was not required to do so. This Court long ago rejected the assertion that a complaint must set forth specific facts to support its general allegations:

> "The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

Conley, 355 U.S. at 47.

Plaintiff clearly should have been given the opportunity to prove his civil rights conspiracy claim. He should have had the opportunity to conduct discovery which would have revealed the identities of the additional conspirators and their roles in the conspiracy. At the proper juncture, i.e. either in a summary judgment motion or at trial, defendant would have had the opportunity to challenge the sufficiency of plaintiff's *proof* of his

conspiracy claim. However, it was error to uphold defendant's challenge to the sufficiency of plaintiff's *pleading*.

It was particularly inappropriate to dismiss the civil rights claim in light of the doctrine, recognized by the Second Circuit but ignored by that court in reviewing the judgment below, that when a corporate officer has an "independent stake" in his actions on behalf of the corporation, the intracorporate conspiracy restrictions do not apply. *See Girard v. 94th St. & Fifth Avenue Corp.*, 530 F.2d 66, 71 (2d Cir. 1976); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974) ("We agree with the general rule but think an exception may be justified when the officer has an independent personal stake in achieving the corporation's illegal objectives").

The Complaint pleaded that Sheib, Avnet's president, acted "on behalf of himself" as well as Avnet.[16/] In alleging that Sheib was acting in part for his own personal benefit to achieve the conspiracy's objective, and not merely as an agent of Avnet, the Complaint met the requirements of the "independent stake" exception.

Kahn's allegation that Sheib acted on his "own behalf", when read in conjunction with the other facts alleged, clearly supports a finding that Sheib had a personal motivation and an independent stake in achieving the conspiracy's objective. The Dekalb litigation, which is the background to these claims, clearly presented Avnet with potential exposure to a substantial monetary judgment and the adverse consequences to Avnet's business reputation of an unfavorable judgment in a lawsuit filed by a customer claiming that Avnet had not performed under its contract. Sheib was responsible for "most of the significant operating decisions on behalf of the DNA division and the DNA subsidiary, including those relating to the conduct of the DeKalb lawsuit."[17/] Therefore, the threat of an unfavorable verdict placed a critical focus on Avnet's president. Sheib was the person who would be held

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16/ See ¶12 of the Complaint.

17/ Complaint, ¶9.

responsible for the loss of the Dekalb suit, inasmuch as Sheib was the *de facto* head of the DNA division of Avnet. It is axiomatic that Sheib's professional reputation, if not his financial and job security, were related to Avnet's success in the Dekalb litigation. Thus, Sheib had a real and personal interest in protecting his position at Avnet, irrespective of his interest in seeing Avnet as a corporation benefit from a favorable judgment.

Sheib's alleged method of protecting this interest was to conspire illegally with Avnet to intimidate Kahn into disobeying a court order and destroying evidence. Sheib clearly stood to profit by the destruction of an overwhelmingly harmful memorandum which severely prejudiced Avnet in the Dekalb litigation. Interpreting the allegations of the First Amended Complaint liberally, it is clear that plaintiff alleged that in threatening and discharging Kahn, Sheib acted to protect his own position within Avnet at the same time he acted on behalf of the corporation. As noted above, for purposes of reviewing Avnet's motion to dismiss, the allegations that Sheib acted on his own behalf and thereby conspired with Avnet must be accepted as true and the complaint construed liberally in plaintiff's favor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN L. ISAACMAN
DAVID O. CARSON*
STEPHEN E. NORRIS
345 North Maple Drive, Suite 200
Beverly Hills, California 90210
(213) 278-1111

Counsel for Petitioner

*Counsel of Record

June 8, 1988

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 27th day of January one thousand nine hundred and eighty-eight.

PRESENT:

HONORABLE RICHARD J. CARDAMONE,

HONORABLE GEORGE C. PRATT,

HONORABLE FRANK X. ALTIMARI,

Circuit Judges.

- x

DAVID LAWRENCE KAHN,

No. 87-7673

Plaintiff-Appellant,

- against -

AVNET, INC.,

Defendant-Appellee.

- x

Plaintiff David Kahn appeals from the May 7, 1987 judgment of the United States District Court for the Southern District of New York (Cannella, J.) dismissing plaintiff's complaint alleging that defendant Avnet, Inc. breached its employment contract with plaintiff after a jury verdict in favor of defendant. Plaintiff's theories of

recovery stem from his claim that Avnet, Inc. discharged him on July 5, 1978 because he refused to commit an unethical act despite defendant's express oral promise not to discharge him except for just cause.

(1) Plaintiff first challenges an order dated February 19, 1982 by Judge Kenyon of the United States District Court for the Central District of California, where this case commenced, dismissing his claims under 42 U.S.C. § 1985(2), which prohibits conspiracies by two or more persons to prevent a person from testifying in federal court and under 18 U.S.C. § 1503, a penal statute prohibiting witness and jury tampering. However, we agree with the district court's dismissal of the § 1985(2) claim. Plaintiff failed to allege a conspiracy between "two or more" persons because the named conspirators -- a corporation, its subsidiary, and its president -- are treated as one person under the "intracorporate conspiracy doctrine." Plaintiff aggressively challenges application of the doctrine, which springs from the antitrust area, to the civil rights context; nevertheless, it is clear that this circuit has recognized no such distinction. See Herrmann v. Moore, 576 F.2d 453, 459 (2d Cir.), cert. denied, 439 U.S. 1003 (1978). We also approve the district court's dismissal of the § 1503 claim because § 1503 is a penal statute in which we do not recognize a private right of action.

(2) Plaintiff contends that the trial court erred in excluding evidence of the circumstances of plaintiff's discharge. We disagree. Once the defendant conceded that plaintiff had been discharged without cause, plaintiff's evidence regarding the circumstances was no longer relevant to his claim that his employment contract was breached by his discharge without cause. Fed. R. Evid. 403.

(3) Plaintiff further argues that because defendant allegedly violated 18 U.S.C. § 1512(a) (prohibiting attempts to coerce another to destroy evidence), plaintiff's discharge from Avnet, Inc. constitutes a breach of the implied covenant of good faith and fair dealing. However, we conclude that the district court's dismissal of this claim was proper. In Murphy v. American Home Care Products Corp., 58 N.Y.2d 292, 305 (1983), the New York Court of Appeals rejected the existence of such a covenant in "at will" employment relationships unless a statute proscribing discharge or an express contractual provision operates

to alter the common law doctrine of employment at will. Because § 1512(a) does not address employment relationships, defendant's actions did not violate an implied covenant of fair dealing.

(4) Plaintiff next urges that the district court erred by dismissing his claims that defendant fraudulently misrepresented its intentions regarding the terms of his employment. Since the jury concluded that Avnet's president had made no promise that plaintiff would be fired only for good cause, it follows necessarily that plaintiff's allegation that the promise was fraudulent must fail. Similarly, plaintiff's prima facie tort claim was properly barred. See Murphy, 58 N.Y.2d at 302-03.

(5) Given our conclusions above and the jury's verdict adverse to plaintiff's contract claim, we need not address the evidentiary and calculation of damages claims.

The judgment of the district court is affirmed.

Richard J. Cardamone, U.S.C.J.

George C. Pratt, U.S.C.J.

Frank X. Altimari, U.S.C.J.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of March one thousand nine hundred and eighty-eight.

DAVID LAWRENCE KAHN,

Plaintiff-Appellant

-V- Docket No. 87-7673

AVNET, INC.,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant-DAVID LAWRENCE KAHN.

Upon consideration by the panel that heard the appeal. it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID L. KAHN,	)	NO. CV 81-3292-Kn
	)	
Plaintiff,	)	
	)	
v.	)	
	)	ORDER
AVNET, INC.,	)	
	)	
Defendant.	)	
	)	

The above matter came on for hearing on Defendant's Alternative Motions to Dismiss Pursuant to Federal Rules of Civil Procedure, Rule 12(b) or, in the Alternative to Transfer the Action Pursuant to 28 U.S.C. 1404(a) on December 14, 1981 in Courtroom 3 of the United States District Court for the Central District of California, the Honorable David V. Kenyon, Judge presiding. Robert Yale Libott and David A. Smitas, members of the law firm of Libott and Associates appeared on behalf of the defendant and moving party, Avnet, Inc. David Lawrence Kahn, plaintiff In Pro Se, appeared on his own behalf. Upon consideration of the First Amended Complaint, Memoranda of Points and Authorities filed and served by the parties and, without consideration of the accompanying Affidavits thereto, and after hearing oral argument of both parties, it is ordered, adjudged and decreed as follows:

1. Count I of Plaintiff's First Amended Complaint is dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the grounds that plaintiff has failed to allege the conspiracy between "two or more persons" required by 42 U.S.C. 1985(2) and has, therefore, failed to state a claim upon which relief may be granted. Because Count I is dismissed on the conspiracy ground, the Court declines to decide the question of whether a claim under 42 U.S.C. 1985(2) requires an allegation of discriminatory animus.

2. Count II of Plaintiff's First Amended Complaint is dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the grounds that any claim of civil contempt became moot upon termination of the Georgia District Court action alleged in plaintiff's Second Count of his First Amended Complaint.

3. Counts III, IV, XI and XII of Plaintiff's First Amended Complaint are dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the grounds that the penal code sections involved in these Counts imply no private right of action in favor of the Plaintiff and, therefore, plaintiff has failed to state a claim under these Counts upon which relief may be granted.

4. Count VII of Plaintiff's First Amended Complaint is dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) on the grounds that the claim is barred by the two-year statute of limitations embodied in California Code of Civil Procedure, § 339(1). The Court finds that the substantive claim of abusive discharge is governed by the law of the State of New York and that New York has not recognized on either a contract or a tort theory the claim of abusive discharge. While there is some indication that the New York court would recognize a tort action for abusive discharge, no such indication has been made with regard to a contract action as the basis for an abusive discharge claim. Because the Court cannot predict that the New York courts would accept a contract theory of abusive discharge, which would fall under the four-year statute in CCP § 337(1), Count VII of Plaintiff's First Amended Complaint must be dismissed on the grounds that it is barred by the two-year tort statute of limitations.

5. Count VIII of Plaintiff's First Amended Complaint is dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the grounds that the claim

is barred by California Code of Civil Procedure, § 339(1). Plaintiff's requested amendment to state a claim for interference with contractual relations would also be barred by California Code of Civil Procedure, § 339(1) and plaintiff's request is therefore denied.

6. Defendant's Motion to Dismiss Count V of Plaintiff's First Amended Complaint is denied. The Court finds that the pleadings are to be liberally construed and the Court finds, for the purpose of a Motion to Dismiss, that plaintiff has sufficiently set out the terms of the Employment Agreement.

7. Defendant's Motion to Dismiss Count VI of Plaintiff's First Amended Complaint is also denied on the grounds that the action for breach of implied covenant of good faith and fair dealing arising out of a written contract is governed by the four-year statute of limitations set forth in California Code of Civil Procedure, § 337(1). Since it is apparent from the face of the First Amended Complaint that plaintiff was referring to a written employment contract, the plaintiff is granted leave to amend this Count to insert the word "written" into Count VI.

8. Defendant's Motion to Dismiss Count IX of Plaintiff's First Amended Complaint is denied. The Court finds that the three-year statute of limitations in Section 339(1) did not begin to run until the termination of plaintiff's employment. Further, the Court grants plaintiff's request to add additional misrepresentation claims to Count IX if such claims can be properly alleged in Plaintiff's Second Amended Complaint.

9. Count X of Plaintiff's First Amended Complaint is dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the grounds that the tort claim of infliction of emotional distress is barred by a one-year statute of limitations pursuant to CCP § 340(3).

10. Defendant's Motion for Change of Venue under 28 U.S.C. 1404(a) as applied to the remaining Counts V, VI and IX is denied. The Court finds that the transfer in this

case would merely shift the balance of conveniences from one party to the other.

DATED: February 19, 1982

DAVID V. KENYON
United States District Judge

Court grants thirty days leave to amend complaint as specified herein.

Kenyon,
Judge

APPENDIX D

David Kahn, Plaintiff Pro Se
535 North Hayworth Avenue
Los Angeles, California

(213) 658-6771

UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

DAVID LAWRENCE KAHN,	
	CIVIL ACTION NO.
Plaintiff,	81 3292 Kn (Kx)
vs.	
	FIRST AMENDED
AVNET, INC.,	COMPLAINT
Defendant.	

Plaintiff, David Lawrence Kahn, as and for his complaint against defendant, Avnet, Inc., alleges as follows:

COUNT ONE - CLAIM UNDER 42 U.S.C. 1985(2)

1. Plaintiff David Kahn is a resident of Los Angeles, California.

2. Defendant, Avnet, Inc., ("Avnet"), is a New York corporation with its principal place business in New York.

3. Defendant, Avnet, is qualified to do business in California as a foreign corporation. Defendant, Avnet, regularly transacts business in Los Angeles, California.

4. From November 1, 1976, through the early morning of July 5, 1978, David Kahn was employed by Avnet as its Corporate Counsel, having overall responsibility for the legal function of Avnet.

5. In July 1978, Avnet had both a separate division as well as a separate subsidiary corporation named Diversified Numeric Applications, ("DNA"), which had been engaged in the business of designing, manufacturing, installing and maintaining computer systems for hospitals and medical laboratories.

6. In early 1978, Avnet decided to terminate DNA's business because of its lack of profitability.

7. In early 1978, one of DNA's customers, Dekalb County Hospital Authority, d/b/a Dekalb General Hospital ("Dekalb"), sued Avnet and DNA in the United States District Court for the Northern District of Georgia in Civil Action No. 78-388A, ("Dekalb lawsuit" or "Dekalb action"). Dekalb's complaint alleged in part that Avnet breached its contract with Dekalb by failing to give Dekalb adequate assurance that Avnet could and would complete its contract with Dekalb and by failing to complete its contract with Dekalb.

8. A court order had been entered in the above case by the United States District Court requiring Avnet to (i) answer certain interrogatories and/or (ii) produce certain documents in response to Dekalb's request for production of documents pursuant to Rules 33, 34 and 37 of the Federal Rules of Civil Procedure.

9. The president of Avnet made most of the significant operating decisions on behalf of the DNA division and the DNA subsidiary, including those relating to the conduct of the Dekalb lawsuit as set forth in paragraphs 11 and 12 herein.

10. David Kahn, while supervising Avnet's production of documents pursuant to the Federal Rules and the Court Order, discovered a memorandum from the General Manager of DNA to Avnet's senior Vice President in New York, which stated that in his opinion, DNA did not have the capability to complete the contract with Dekalb ("memorandum").

11. David Kahn reported the content and significance of the above memorandum to Avnet's Senior Vice President in New York. Later while talking with Avnet's President, who was in California at the time, Avnet's Senior Vice President in New York told the President about the content and significance of the memorandum that David Kahn had discovered. Avnet's

President then told Avnet's Senior Vice President to tell David to lose the document. Avnet's Senior Vice President then relayed the President's order, and told David Kahn that the President of Avnet (who was in California at the time) said that "David should lose the document." In response, David Kahn told Avnet's senior Vice President that he could not, and would not, "lose" the memorandum because to do so would be both illegal and unethical.

12. After returning to New York from California, on July 5, 1978 the President of Avnet on behalf of himself, Avnet, Inc. and DNA, Inc. again instructed David Kahn to "lose" the above memorandum. David Kahn told the President of Avnet that he could not and would not do so because it would violate the law, be in contempt of court, be unethical, and in addition would result in perjury when David Kahn would have later (i) signed under oath an affidavit stating that he had supervised the production of documents and that such production was complete, and (ii) answered falsely Dekalb's interrogatories covering the subject matter of the memorandum.

13. The President of Avnet then told David Kahn that unless he agreed to "lose" the memorandum, he would be immediately fired.

14. When David Kahn refused, on the morning of July 5, 1978, to agree (i) to lose the memorandum, (ii) to testify falsely in a production of documents affidavit, and (iii) to testify falsely in answering certain Dekalb interrogatories, he was immediately terminated as an employee of Avnet.

15. Avnet knew, or reasonably should have known, in June and July 1978 that David Kahn would be called as a witness in the Dekalb lawsuit because of his involvement in the Dekalb negotiations (before such suit was filed) on the critical issue of whether Avnet gave Dekalb adequate written assurance of performance. In addition, Avnet knew that David Kahn would be a witness in the Dekalb lawsuit by virtue of the production of documents affidavit to be executed by him and the interrogatories to be answered by him.

16. The actions of Avnet, Diversified Numeric Applications, Inc., the President of Avnet and additional parties (who will become known during discovery) in ordering David Kahn to testify falsely in the Dekalb

action in an affidavit covering the production of documents, in answering certain interrogatories, in not producing the memorandum, and in threatening to discharge, and discharging, David Kahn for refusing to follow such orders gives David Kahn the right to recover damages pursuant to 42 U.S.C. 1985(2). That section provides in relevant part: "If two more persons in any state... conspire to deter by...intimidation, or threat any party or witness in any court of the United States from testifying to any matter pending therein, freely, fully and truthfully..."

17. As a result of Avnet's wrongful discharge, David Kahn lost income, incurred job finding expenses, and suffered great mental and physical pain.

18. The aforesaid wrongful orders to David Kahn threatened discharge, and discharge of David Kahn were willful, wanton and malicious.

COUNT TWO - CLAIM FOR CIVIL CONTEMPT

19. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17 and 18.

20. The actions of Avnet in ordering David Kahn to testify falsely in the Dekalb action in an affidavit covering the production of documents, in answering certain interrogatories, in not producing the memorandum, and in threatening to discharge, and discharging, David Kahn for refusing to follow such orders and disobey (i) Rules 33, 34 and 37 of the Federal Rules of Civil Procedure, and (ii) a U.S. District Court order in the Dekalb action requiring the production of the memorandum and/or the answering of certain interrogatories gives David Kahn the right to recover damages for civil contempt under the inherent power of the Court to award damages for civil contempt and/or under 18 U.S.C. 401(3) which provides in relevant part: "A court of the United States shall have the power to punish by fine.. resistance to its lawful... order, rule..."

COUNT THREE -- CLAIM UNDER 18 U.S.C. 1503

21. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17 and 18.

22. The actions of Avnet by threatening to discharge, and discharging, David Kahn because he refused (i) to lose the memorandum required to be produced under the Federal Rules of Civil Procedure and a U.S. Federal District Court Order and (ii) to testify falsely in answering

interrogatories and in an affidavit covering the production of documents gives David Kahn the right to recover damages pursuant to 18 U.S.C. 1503. That section provides in relevant part: "Whoever corruptly, or by threats...endeavors to influence, intimidate, or impede any witness, in any court of the United States...or corruptly or by threats...influences obstructs, or impedes or endeavors to influence, obstruct, or impede the due administration of justice..."

COUNT FOUR - CLAIM UNDER SECTION 137(b) OF CALIFORNIA PENAL CODE

23. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17 and 18.

24. The actions of Avnet's President (while in California) of ordering David Kahn (under the implied threat of discharge if the orders were not followed) to testify falsely by losing the memorandum, (and by necessary implication) by falsely answering interrogatories and by falsely testifying in an affidavit covering the production of documents, gives David Kahn a right to recover damages under Section 137(b) of the California Penal Code. That section provides in relevant part: "Every person who attempts by... the use of fraud to induce any person to give false testimony or withhold true testimony is guilty of a felony..."

25. The court has jurisdiction over this claim (i) based on the doctrine of pendent jurisdiction, and (ii) by virtue of diversity jurisdiction.

COUNT FIVE - CLAIM FOR BREACH OF EMPLOYMENT AGREEMENT

26. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17, 18 and 25.

27. The aforesaid actions of Avnet in ordering David Kahn to lose the memorandum, to testify falsely in the Dekalb action in an affidavit covering the production of documents and in answering certain interrogatories (all of which violated Federal and State criminal statutes, court rules and orders, and professional canons of ethics), and in threatening to discharge, and wrongfully discharging, David Kahn for refusing to follow such orders breached one or more of the following implied terms and conditions of the written employment agreement between them (as

such agreement was extended, modified, supplemented, and amended orally by the parties and/or by the practices of Avnet):

(A) That Avnet would not request David Kahn to commit any act which would violate any Federal or State criminal statute;

(B) That Avnet would not request David Kahn to commit any act which would be in contempt of any court;

(C) That Avnet would not request David Kahn to commit any act which would violate the rules of procedure of any court;

(D) That Avnet would not request David Kahn to commit any act which would constitute perjury or obstruction of justice;

(E) That Avnet would not request David Kahn to commit any act which would be considered unethical under prevailing legal standards;

(F) That Avnet would not discharge David Kahn for his refusual to engage in any or all the acts covered by (A) through (E) above.

28. Avnet also breached the express terms and conditions of its written employment agreement with David Kahn (as extended modified, supplemented and amended orally by the parties and/or by the practices of Avnet) in one or more of the following ways:

(A) By discharging David Kahn without just cause;

(B) By not paying David Kahn the agreed severance pay of $22,500 or giving him six months prior notice of the discharge;

(C) By not paying David Kahn the pro rata portion of the "balloon" part of his fixed compensation in the amount of approximately $4,666.

(D) By not paying David Kahn the fair market value of the Avnet stock to be awarded under Avnet's stock incentive program.

COUNT SIX - CLAIM FOR BREACH OF IMPLIED AT LAW COVENANT OF GOOD FAITH AND FAITH DEALING

29. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17, 18, and 25.

30. The aforesaid wrongful actions of Avnet (in addition to other similar wrongful actions) in ordering David Kahn to lose the memorandum, to testify falsely in the Dekalb action in an affidavit covering the production of documents and in answering certain interrogatories, and in threatening to discharge, and wrongfully discharging, David Kahn for refusing to follow such orders breached the implied at law covenant of good faith and fair dealing in the employment contract between David Kahn and Avnet.

COUNT SEVEN - CLAIM FOR ABUSIVE DISCHARGE OR DISCHARGE CONTRARY TO PUBLIC POLICY

31. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17, 18, and 25.

32. The aforesaid wrongful discharge of David Kahn by Avnet for refusing to lose the memorandum and for refusing to testify falsely in the Dekalb lawsuit in an affidavit for production of documents and in answering interrogatories constituted the tort of abusive discharge or the tort of discharge contrary to public policy.

COUNT EIGHT - CLAIM FOR INTENTIONAL INTERFERENCE WITH ADVANTAGEOUS ECONOMIC RELATIONSHIP

33. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17, 18, and 25.

34. At the time Avnet offered David Kahn the position of corporate counsel, Avnet knew that (i) David Kahn was currently employed with another company, (ii) that his pension rights would vest in approximately three years, and (iii) that David Kahn intended to remain as an employee of such company until his pension rights were vested.

35. Avnet intended to, and did, wrongfully induce David Kahn to terminate his employment with such other company by (i) not disclosing to David Kahn that Avnet intended that David Kahn would be requested to, and

expected to, perform the criminal acts of perjury and obstruction of justice as a regular part of his job responsibilities, and (ii) telling David Kahn that Avnet had no significant existing legal problems, while having actual knowledge that several operations and/or functions within Avnet were regularly engaged in a course of criminal acts.

36. But for Avnet's wrongful inducements as set forth in paragraph 35 above, David Kahn (i) would not have accepted Avnet's employment offer, (ii) would have remained as an employee of such other company until his pension vested in early 1981, and (iii) would have received greater salary, bonuses, stock appreciation rights, savings plan contributions, and other greater benefits from July 1978 through early 1981.

37. Avnet's actions set forth in paragraphs 33 through 36 above constituted an intentional interference with David Kahn's advantageous economic relationship with his former employer. Avnet's aforesaid intent to wrongfully interfere with David Kahn's advantageous economic relationship with his former employer was made known to David Kahn on July 5, 1978.

COUNT NINE - CLAIM FOR MISREPRESENTATION

38. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17, 18, 25, 34, 35, and 36.

39. Avnet's material and intentional misrepresentation of its intent and/or actions as set forth in paragraphs 33, 34 and 35 above were relied upon by David Kahn to his detriment as set forth in paragraph 36.

40. Avnet's wrongful actions as set forth in paragraphs 33 through 36 above constituted the tort of misrepresentation, which was made known to David Kahn on July 5, 1978.

COUNT TEN - CLAIM FOR INTENTIONAL OR RECKLESS INFLICTION OF SEVERE EMOTIONAL DISTRESS

41. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17, 18, 25, 34, 35, and 36.

42. Avnet's wrongful action in summarily discharging David Kahn on July 5, 1978 under the aforesaid circumstances caused David Kahn severe emotional distress as well as physical distress -- all of which was intentionally or recklessly caused by Avnet.

COUNT ELEVEN - CLAIM UNDER
SECTION 215.10(b)
OF NEW YORK PENAL CODE

43. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17, 18, and 25.

44. The actions of Avnet in ordering David Kahn to give false testimony in the Dekalb lawsuit in answering certain interrogatories, in an affidavit about the production of documents, and in not producing the memorandum; and in threatening to discharge, and discharging, David Kahn because he refused to follow such orders, gives David Kahn the right to recover damages pursuant to Section 215.10(b) of the New York Penal Code. That section provides in relevant part: "A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding... (b) he knowingly... practices any fraud or deceit with the intent to affect the testimony of such person."

COUNT TWELVE - CLAIM UNDER
SECTION 215.40(2)
OF NEW YORK PENAL CODE

45. David Kahn realleges and incorporates herein by reference numbered paragraphs 1 through 15, 17, 18, and 25.

46. The actions of Avnet in ordering David Kahn to lose the memorandum and in threatening to discharge, and in discharging, David Kahn because he refused to follow such order gives David Kahn the right to recover damages pursuant to Section 215.40(2) of New York Penal Code. That section provides in relevant part: "A person is guilty of tampering with physical evidence when ... (2) believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by... employing...intimidation or deception against any person."

WHEREFORE, Plaintiff, David Kahn, demands judgment against Defendant Avnet for:

1. Compensatory damages of two hundred fifty thousand dollars $250,000);

2. Punitive damages of two million five hundred thousand ($2,500,000);

3. Costs of this action;

4. Reasonable attorney's fees;

5. Such other and further relief which the Court may deem just and proper.

David Kahn, Plaintiff Pro Se
535 N. Hayworth Avenue, #301
Los Angeles, California 90048

Dated: October 15, 1981

JURY DEMAND

The Plaintiff David Kahn hereby demands a jury trial in this action.

David Kahn, Plaintiff Pro Se

CERTIFICATE OF SERVICE

I David L. Kahn, hereby affirm under the penalties of perjury that I served the foregoing First Amended Complaint on Defendant by mailing a copy thereof to Defendant's attorneys, Libott and Associates, by first class mail with proper postage affixed, at 727 West 7th Street, Suite 650, Los Angeles, California 90017.

David Kahn

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on June 8, 1988, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

George Graff, Esq.
Milgrim, Thomajan & Lee, P.C.
405 Lexington Avenue
New York, New York 10174
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 8, 1988, at Los Angeles, California.

Claude A. Lagardere
(Original signed)

OFFICIAL SEAL
SALLY H JONES
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires MAY 22, 1989

(2)

No. 87-2037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVID LAWRENCE KAHN,

Petitioner,

vs.

AVNET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT AVNET, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there a significant dispute among the Circuits that the "conspiracy" requirement of 42 U.S.C. § 1985(2) is not met when plaintiff alleges that actions were undertaken solely by a single individual acting on behalf of a corporation and its subsidiary?

2. Is it appropriate for this Court to grant certiorari to consider the applicability of the "intracorporate conspiracy" doctrine to the witness intimidation provisions of 42 U.S.C. § 1985(2) in a case where:

(a) the plaintiff was not a party to the litigation in which the alleged intimidation occurred;

(b) the only act of "force, intimidation or threat" alleged was the lawful termination of an at will employment;

(c) the alleged "conspiracy" only involved a single named individual;

(d) the alleged intimidation was not intended to, and did not in fact, deter any person's testimony or attendance in court; or

(e) the plaintiff in this action did not allege the plaintiff in the underlying action suffered any injury as a result of the alleged "conspiracy"?

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1985

. . .

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . .

(3) . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

No. 87-2037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVID LAWRENCE KAHN,

Petitioner,

VS.

AVNET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT AVNET, INC. IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This action involves a number of claims by plaintiff David Kahn ("Kahn") against defendant Avnet, Inc. ("Avnet"), all arising out of Avnet's discharge of Kahn from his employment as a staff attorney in July of 1978. In his First Amended Complaint, Kahn alleged twelve separate claims for relief, including, in addition to the alleged violation of 42 U.S.C. § 1985 which is the subject of this petition, claims for "civil contempt", violation of section 137(b) of the California penal code, abusive discharge, intentional interference with advantageous economic relationship, intentional infliction of "severe distress", violations of sections 215.10(b) and 215.40(2) of the New York penal code, a claim of a private cause of action under 18 U.S.C. § 1503, breach of his employment agreement, breach of an implied covenant of good faith and fair dealing and fraudulent misrepresentation.

Kahn's Section 1985(2) claim, the dismissal of which is the sole issue sought to be reviewed in this petition, was predicated upon an incident which allegedly occurred when Kahn, in pursuing his duties as a corporate attorney for Avnet, was supervising Avnet's document production in a contract dispute then pending in the United States District Court in Georgia between a Georgia hospital and an Avnet subsidiary named Diversified Numeric Applications, Inc. (the "Georgia Action"). Kahn claimed that he had discovered a document — not authored by him — which purportedly was adverse to Avnet's position in the Georgia Action and that Avnet's President relayed an order to Kahn to "lose" the document. Kahn claimed that he refused to do so, and that Avnet's President then called him into his office and fired him.

The document was, in fact, voluntarily produced by Avnet shortly after Kahn's termination (2d Cir. Appendix, at A-494), and Kahn did not claim that the Georgia Action was affected in any way by Kahn's discharge. Nonetheless, Kahn claimed that "the actions of Avnet, Diversified Numeric Applications, Inc., the President of Avnet and additional parties (who will become known during discovery)" constituted a violation of 42 U.S.C.

§ 1985(2), entitling Kahn to recover the damages resulting from the loss of his employment (Kahn App., at D-3 – D-4)[1].

The United States District Court for the Central District of California (Kenyon, J.) granted defendant's motion to dismiss the Section 1985(2) claim, along with all but three of the other counts of Kahn's twelve count complaint, on the ground that Kahn had failed to allege a conspiracy "between two or more persons", as required by the statute (Kahn App., at C-2). And, despite extensive discovery, Kahn never sought to amend his complaint to allege the involvement of any additional individuals in the conspiracy.

After a transfer of venue, the case went to trial in the United States District Court for the Southern District of New York on Kahn's claims of breach of express and implied contract and fraud arising out of his termination. Although Avnet's president, who hired and fired Kahn, had died prior to the commencement of the action and, hence, Kahn's testimony was unrebutted, the jury disbelieved Kahn's claim that he had been orally promised that he would only be fired for "good cause" and found for Avnet on all counts.

On his appeal to the Second Circuit following the adverse jury verdict, Kahn challenged several earlier rulings in the case, including the dismissal of his Section 1985(2) claim. He argued, as he does in this Court, that the "intracorporate conspiracy" exception adopted by this Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), has no applicability to the civil rights laws and that, accordingly, the court could find that a conspiracy existed between Avnet, its subsidiary, and its president.

The Court of Appeals rejected this argument, holding (Kahn App., at A-2) that, under its previous decision in *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978), "the named conspirators – a corporation, its subsidiary,

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[1] Throughout this brief, the appendix to Kahn's petition for certiorari will be cited as "Kahn App."

and its president — are treated as one person under the 'intracorporate conspiracy doctrine' ". It is this holding which forms the sole basis for Kahn's petition for certiorari.

REASONS FOR NOT GRANTING CERTIORARI

Point I

No Conflict Exists Among The Circuits That Kahn Has Failed To Allege A Conspiracy

Kahn urges that this Court should grant certiorari in order to resolve a purported "conflict in the circuits which is ripe for resolution by this Court" concerning the applicability of the "intracorporate conspiracy" doctrine to claims arising under the Civil Rights Act (Kahn's Petition, at 7-8).[2] However, this case is an inappropriate vehicle for this Court to confront that issue; the only named individual who allegedly participated in the decision to terminate Kahn was Avnet's president, and it is clear that his *unilateral* conduct, whether or not the "intracorporate conspiracy" doctrine applies, is not an act of "two or more persons" within the meaning of 42 U.S.C. § 1985(2).

It is fundamental to a Section 1985(2) claim that the plaintiff must allege an agreement between "two or more persons" to have a conspiracy. The essence of Kahn's position, however, is that a conspiracy claim can be premised on the actions of only one identified individual allegedly acting on behalf of two corporations and joined by unnamed "additional parties."[3] There

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[2] The "intracorporate conspiracy" doctrine is generally used to describe the rule, adopted by this Court for antitrust cases in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), that coordinated conduct among the officers of a corporation and its wholly owned subsidiaries must be viewed as the acts of a single enterprise and cannot form the basis for a claim of conspiracy.

[3] Paragraph 16 of Kahn's First Amended Complaint (Kahn App., at D-3 – D-4 states in pertinent part as follows:

(Footnote continued)

is simply no case known to Avnet, and certainly none cited by Kahn, which holds that such an allegation would be sufficient to state a claim of conspiracy.

It is true that a dispute has arisen among the circuits as to whether concerted action by two or more individuals who are acting for a single enterprise can constitute a conspiracy for purposes of the Civil Rights Act. *Compare, e.g., Herrmann v. Moore*, 576 F.2d 453 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978), *with Stathos v. Bowden*, 708 F.2d 15, 20-21 (1st Cir. 1984). However, this inter-circuit dispute centers around whether the joint acts of several named individuals, who would otherwise be clearly guilty of a conspiracy, can be *immunized* from liability simply because they are acting on behalf of a single corporate enterprise.[4]

Avnet is aware of no decision in any federal court which supports the proposition that the actions of only one identified individual are sufficient to allege a conspiracy under Section 1985(2).[5] Without exception, the plaintiffs in every single case, including those cases which have rejected the "intracorporate conspiracy" doctrine in civil rights claims, have identified with particularity two or more individuals who allegedly conspired against plaintiff.[6]

> "16. The actions of Avnet, Diversified Numeric Applications, Inc., the President of Avnet and additional parties (who will become known during discovery) . . . gives David Kahn the right to recover damages pursuant to 42 U.S.C. 1985(2)."

[4] As the First Circuit stated in *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984), "under ordinary conspiracy principles, a jury could plainly impose liability – and there would be no issue – were a *single corporation not involved*." (Emphasis in original).

[5] Kahn's reliance on *Dussouy v. Gulf Coast Investment Corporation*, 660 F.2d 594 (5th Cir. 1981), is misplaced. That decision involved application of the intracorporate conspiracy doctrine under *Louisiana state*, not federal, law dealing with conspiracy in restraint of trade, La. Rev. Stat. Ann. § 51:121 *et seq.*

[6] *See, e.g., Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985) (conspiracy among twenty-five state employees); *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984)

(Footnote continued)

In *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235 (3d Cir. 1978) (en banc), *rev'd on other grounds*, 442 U.S. 366 (1979), a case upon which Kahn heavily relies, the Third Circuit specifically noted the distinction between the question before it — the applicability of the intracorporate conspiracy doctrine to civil rights claims — and the position which Kahn asserts — that a "conspiracy" can exist between a corporation and an individual who acts on its behalf:

> "As we read Novotny's complaint, however, it does not allege that the corporate entity, GAF, conspired with its officers and directors to his detriment. In defining his cause of action under § 1985(3), Novotny alleges that his termination was accomplished "by the individual defendants in violation of" § 1985(3). *There is thus no occasion to evaluate the force of the proposition that a corporation cannot conspire with itself.* Rather, the sole issue before us, so far as the conspiracy element is concerned, is whether concerted action by officers and employees of a corporation, with the object of violating a federal statute, can be the basis of a § 1985(3) complaint."

(conspiracy among several members of municipal lighting commission); *Doherty v. American Motors Corp.*, 728 F.2d 334 (6th Cir. 1984) (conspiracy among five employees and/or agents of corporation); *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982)(conspiracy between five school district trustees and school superintendent); *Novotny v. Great American Fed. Savings & Loan Ass'n.*, 584 F.2d 1235 (3d Cir. 1978) (en banc), *rev'd on other grounds*, 442 U.S. 366 (1979) (conspiracy among eight officers and directors of corporation); *Herrmann v. Moore*, 576 F.2d 453 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978) (conspiracy among thirty-eight individuals associated with law school); *Girard v. 94th Street and Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976) (conspiracy among officers and entire board of directors of corporation); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974) (conspiracy between two individuals who owned stock of defendant corporation and president of parent corporation); *Dombroski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (court dismissed claim even assuming "two or more executives of the same firm" involved in conspiracy). *See also United States v. Hartley*, 678 F.2d 961 (11th Cir.), *cert. denied*, 459 U.S. 1170 (1983) (criminal conspiracy under 18 U.S.C. § 371 between vice president and plant manager of corporation).

584 F.2d at 1257-58 (footnote omitted and emphasis supplied). In this case, however, unlike *Novotny* or any of the other cases Kahn cites, the only "persons" identified as participating in the conspiracy are Avnet's president and the two corporations on whose behalf he allegedly acted.[7]

To be sure, Kahn's complaint does contain a general allegation that "additional parties (who will become known during discovery)" participated in the actions. However, such broad, conclusory statements, which do not identify or describe any particular individuals, are not sufficient to state a claim of conspiracy under Section 1985. *Scott v. University of Delaware*, 385 F. Supp. 937, 944 (D. Del. 1974); *see United States v. Verville*, 355 F.2d 527 (7th Cir. 1966) (allegation of conspiracy between defendants and unnamed police and public officials insufficient to state claim in civil rights case).

The fact is that, despite extensive discovery in this case, Kahn has never been able to identify any individual, other than Avnet's president, who participated in the alleged conspiracy. No federal court has held that such unilateral action sufficiently pleads a conspiracy "among two or more persons," either under Section 1985(2) or any other federal conspiracy statute, and there is no dispute among the circuits or other significant federal question raised in this case which justifies consideration by this Court.

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[7] Another individual, Avnet's Senior Vice President, is identified in the complaint as having relayed the president's instructions to lose the document Kahn allegedly discovered. (*See* Kahn App., at D-2 – D-3). However, there is no allegation that this individual agreed to or participated in the alleged conspiracy to threaten and ultimately fire Kahn for his refusal to lose or surpress that document.

POINT II

Even If A Conspiracy Were Properly Alleged, The Complaint Fails To State A Claim Under Section 1985(2)

Kahn's petition for certiorari is premised upon the unstated assumption that the *only* question as to the sufficiency of his pleading is whether it adequately alleged a conspiracy among "two or more persons". However, although the courts below did not find it necessary to reach the issue, it is clear that wholly apart from Kahn's failure to plead a conspiracy, Kahn's complaint is insufficient under Section 1985(2).

The essential allegations of a Section 1985(2) claim of witness intimidation are (1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in legally cognizable injury to the plaintiff. *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987); *Malley-Duff & Associates, Inc. v. Crain Life Insurance Co.*, 792 F.2d 341, 355 (3d Cir. 1986); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 498 (9th Cir. 1985); *Chahal v. Paine Webber, Inc.*, 725 F.2d 20, 23 (2d Cir. 1984).

Apart from the fact that only one identified person (Avnet's president) was involved, Kahn's claim fails to meet these requirements in several respects. In the first place, Kahn was simply an attorney for one of the parties to the Georgia Action; he had no personal stake in the outcome. Thus, Kahn was not among the class of persons for whose benefit the statute was enacted and the injury he suffered, the loss of a job which, as the district court and the Second Circuit held, was terminable at will, was not the type of injury which Section 1985(2) was designed to remedy. Moreover, to the extent that the only purpose of the alleged conspiracy was to influence his conduct as an attorney in supervising the production of a document, the complaint fails to allege the requisite purpose of deterring attendance or influencing testimony in federal court.

The clear statutory purpose of the portion of Section 1985(2) relevant to this case is to protect litigants in the federal courts from improper interference with their ability to prosecute or defend their cases. Thus, the only Court of Appeals decision which has ruled on the issue has held that a person who is not a litigant in a federal proceeding, and whose alleged injury is totally unrelated to the effects of the alleged interference on that proceeding, has no standing to assert a claim under Section 1985(2). *David v. United States*, 820 F.2d 1038 (9th Cir. 1987); *see generally Rode v. Dellarciprete*, 1988 U.S. App. Lexis 5642 (3d Cir. April 28, 1988) (court found it unnecessary to decide whether a witness has standing under Section 1985(2) because plaintiff was neither a witness nor a litigant in underlying federal action).

In the *David* case, the plaintiff alleged that she was improperly terminated by her employer as a result of her testimony as a witness in a federal case to which she was not a party. In language wholly applicable to the case at bar, the Ninth Circuit rejected her claim under section 1985(2):

> "David has not alleged how *she* had been injured by her testimony in [the underlying action] or her failure to appear in court. Allegations of witness intimidation under § 1985(2) will not suffice for a cause of action unless it can be shown the *litigant* was hampered in being able to present an effective case. Since David has not shown she was a party to the action in which she was intimidated, she can show no injury under § 1985(2)."

820 F.2d at 1040 (emphasis in original).

In this case, Kahn was not even a witness in the federal action upon which his Section 1985(2) claim is based, he was merely an attorney for one of the litigants. And, as in *David*, the injury he complains of — the loss of his employment — had no bearing whatsoever on the ability of the litigant in the federal claim "to present an effective case."

Moreover, even if Kahn's personal injury were otherwise recoverable under the statute, Kahn sustained no actionable damage as a result of his termination. The jury disbelieved Kahn's testimony that he had been orally promised lifetime employment and, accordingly, under New York law, Kahn was an at will employee whose employment relationship could be terminated at any time, for any reason, or for no reason at all. *See Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983). Because Kahn was an at will employee, he had no measurable right to remain in Avnet's employ and his discharge did not constitute an actual injury under Section 1985(2). *See Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987) (Section 1985(2) claim by bank officer that he was terminated to deter him from testifying at a federal hearing dismissed, *inter alia*, because his discharge from at will employment "did not constitute an actual injury under the statute").

Finally, Kahn's complaint is legally insufficient because the alleged conspiracy (to induce him not to produce a document in discovery) did not have the requisite statutory purpose: "to deter, by force, intimidation, or threat, *any party or witness* in any court of the United States from *attending such court, or from testifying* to any matter pending therein freely, fully and truthfully . . . ." 42 U.S.C. § 1985(2) (emphasis supplied); *see Brown v. Chaffee*, 612 F.2d 497, 502 (10th Cir. 1979); *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976).

In construing this provision, the courts have consistently limited the applicability of Section 1985(2) to acts of intimidation which directly affect a witness's or party's actual testimony or attendance *in court*. *See, e.g., McLean v. International Harvester Co.*, 817 F.2d 1214, 1218 (5th Cir. 1987) (holding that where plaintiff's "sole basis for seeking . . . relief [under § 1985(2)] rests on the allegations that the defendants . . . failed to disclose information to [plaintiff] and failed to produce documents to [plaintiff] . . ., such allegations, even if proved, are insufficient to state a violation of § 1985(2)"); *Pitts v. Turner & Boisseau, slip op.* (D. Kansas Aug. 26, 1986) (holding that to

violate section 1985(2) the conspiracy "must be one directly affecting the act of testifying in court, or affecting any party from attending court"). *See also Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987) (testimony in a federal administrative proceeding was not "testimony in any court of the United States"); *Kimble v. P.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir.), *cert. denied*, 454 U.S. 1110 (1981) (alleged conspiracy to deter plaintiffs from filing lawsuits or claims, as opposed to appearing and testifying, did not fall within Section 1985(2)).

The simple fact is that Kahn's sole involvement in the Georgia Action was to function as an attorney supervising document production. There is no hint in the pleading that the purported conspiracy was intended to deter or interfere, in any way, with Kahn's attendance or testimony as a witness at the trial of that action. Even if (despite strong evidence to the contrary) Kahn was discharged by Avnet's president for improper reasons, Kahn hardly states a federal claim for conspiracy to intimidate a witness from attending or testifying in federal court under 42 U.S.C. § 1985(2).

CONCLUSION

For the foregoing reasons, respondent Avnet, Inc. respectfully requests that the petition of David Lawrence Kahn for a writ of certiorari be denied.

Respectfully submitted,

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REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

There appears to be no dispute among the parties that the issue which is the basis for Kahn's petition is ripe for review by this Court. Instead, the only issue raised by Avnet is whether this particular case is the proper vehicle for review of the "intracorporate conspiracy doctrine" in civil rights actions.

I

This Case Concerns a Conspiracy Among at Least Two Individuals and Two Corporate Entities

Avnet *admits* that there is a conflict among the circuits regarding the intracorporate conspiracy doctrine, but denies

that the conflict applies to this case because, according to Avnet, the First Amended Complaint (hereinafter "the Complaint," found at Appendix D to the Petition for a Writ of Certiorari) alleged unilateral conduct by one individual, albeit through two corporate entities. Avnet misconstrues the Complaint.

As pointed out in the Petition for Writ of Certiorari, Kahn's contention is that at least two individuals, Simon Sheib and William Scharffenberger, conspired to deprive him of his civil rights. *See* Petition at 3, 5, 17. Sheib was President of Avnet, and Scharffenberger was its Senior Vice-President.

The Complaint *pleaded* the participation of both Sheib and Scharffenberger[1] in the conspiracy. With respect to Sheib, *see* ¶¶9, 11, 12, 13 and 16. With respect to Scharffenberger, see ¶11. *See also* ¶16 ("and additional parties"). Both men were clearly alleged to have participated in the conspiracy.

Indeed, it was Scharffenberger who is alleged to have instructed Kahn to destroy evidence, the illegal act which Kahn refused to carry out, leading to his discharge.

Avnet acknowledges, in a footnote,[2] that Scharffenberger is also identified in the Complaint, but denies that the pleading was sufficient to identify him as a participant in the conspiracy. There are at least two responses to this assertion. First, the Complaint clearly identified Scharffenberger as the senior corporate officer who commanded Kahn to destroy evidence. *See* ¶11 of the Complaint (App. D at D-2 and D-3). When a superior corporate officer orders an employee to destroy evidence, such a command certainly qualifies as the use of "force, intimidation, or threat" pursuant to 42 U.S.C. §1985. In such a command there was an implied threat (which ultimately became explicit) that Kahn would lose his job if he did not obey. As one court construing §1985(2) has noted, "intimidation can take many forms." *Hoopes v.*

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1 The Complaint, Appendix D to the Petition, did not name Sheib and Scharffenberger by name. Instead, it referred to them by their corporate offices: President and Senior Vice-President of Avnet.

2 Footnote 7 to Brief for Respondent Avnet, Inc. in Opposition.

Nacrelli, 512 F. Supp. 363, 368 (E.D. Pa. 1981). Scharffenberger therefore engaged in a key illegal act to carry out the goals of the conspiracy.[3]

Second, even if more was required to be pleaded in order to make Scharffenberger a participant in the conspiracy, the proper ruling would not have been to dismiss the claim, but rather to require a more definite statement as to Scharffenberger's role in the conspiracy. *See* Rule 12(e), Fed.R.Civ.P.

Finally, the Complaint pleaded that the conspiracy also included "additional parties (who will become known during discovery)." App. D at D-3, ¶16. Given that the dismissal came at the pleading stage, surely it was improper to foreclose plaintiff from seeking to prove the participation of even more individuals in the conspiracy.

II
Kahn Otherwise Stated A Claim Pursuant to 42 U.S.C. §1985(2)

Half of Avnet's argument is devoted to its contention that for reasons *apart from* the applicability of the intracorporate conspiracy doctrine, Kahn has not stated a claim upon which relief can be granted pursuant to 42 U.S.C. §1985(2). See Point II of Brief for Respondent Avnet, Inc. in Opposition. Because the District Court did not consider these defenses below, but simply dismissed the claim based upon its reading of the intracorporate conspiracy doctrine, it would be inappropriate for this Court to consider these arguments in the first instance. Rather, the dismissal should be reversed and remanded for further proceedings, in which the District Court could rule for the first time on Avnet's other objections to the claim. In any event, these other objections raised by Avnet are specious.

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[3] Of course, as a coconspirator Scharffenbarger need only have engaged in some of the acts taken in furtherance of the conspiracy. *See Old Sec. Life Ins. v. Continental Ill. Nat. Bank*, 740 F.2d 1384, 1397 (7th Cir. 1984).

A. Witnesses Have Standing to Pursue §1985(2) Claims

It is not necessary for a plaintiff claiming a violation of §1985(2) to have a personal stake in the outcome of the underlying litigation. As a *witness*, Kahn clearly was among the class of persons for whose benefit the statute was enacted. Section 1985 provides that in cases of conspiracy to deter a party or witness in any court of the United States from attending such court or testifying freely, fully and truthfully, "whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, *the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation*, against any one or more of the conspirators."

Under the plain language of Section 1985, a witness who is intimidated from testifying and is injured thereby has a cause of action against the conspirators.

While Avnet is technically correct in noting that the only Court of Appeals decision to determine whether nonlitigants have standing under §1985(2) held that they do not, *see David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987), Avnet itself has also cited to a case which casts doubt on *David's* conclusion. *See Rode v. Dellarciprete*, 845 F.2d 1195, 1206-1207 (3d Cir. 1988). In *Rode*, the Third Circuit rejected a §1985(2) claim because the plaintiff "was neither a party *nor a witness* in the *Clanagan* action." *Id.* at 1206 (emphasis added). The court described §1985(2) as a statute which "provides a cause of action based on the intimidation of witnesses in a federal court action." *Id.* The court noted three cases in which *witnesses* were given standing to sue under §1985(2). *Id.* at 1207, citing *Hoopes v. Nacrelli*, 512 F. Supp. 363, 368 (E.D. Pa. 1981); *Kelly v. Foreman*, 384 F. Supp. 1352, 1353 (S.D. Texas 1974); and *Crawford v. City of Houston*, 386 F. Supp. 187, 192 (S.D. Texas 1974).

In *Kelly*, the court observed that the statute clearly gives a cause of action to any person injured in the course of the conspiracy. 384 F. Supp. at 1353. In *Hoopes*, the court held that "Under this segment of § 1985, a party states a claim so long as he alleges a conspiracy to deter him from or retaliate against him for testifying in a court proceeding." 512 F. Supp. at 368.

These cases construe the statute's plain meaning as well as the policy reasons behind the statute in order to conclude that it gives an intimidated witness the right to sue. In contrast, *David*, the single case cited by Avnet to the contrary, simply states that a §1985(2) action requires that the litigant in the underlying action was hampered by witness intimidation in presenting an effective case. 820 F.2d at 1040. No rationale is presented for this conclusion, and the only authority cited in its support does *not* support the conclusion. *See Chahal v. Paine Webber, Inc.*, 725 F.2d 20 (2d Cir. 1984). In fact, In *Chahal* the court concluded that §1985(2) is to be construed *liberally*. 725 F.2d at 24.

In *Chahal*, the court also stated:

> The essential allegations of a §1985(2) claim of witness intimidation are (1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) *results in injury to the plaintiff.*

Id. at 23 (emphasis added). Kahn, the plaintiff herein, was injured by the acts of Avnet, Sheib and Scharffenberger to deter him from testifying, thus qualifying for the protection of §1985(2). To the extent that *David* requires a showing of injury to the litigant in the underlying action, it grafts a wholly unwarranted, extraneous element onto §1985(2) claims which has no support in either the statutory language of the statute nor the policies underlying it.

B. Kahn Was A Witness Under §1985(2)

Avnet contends that Kahn was not a witness in the Dekalb action, but was simply an attorney supervising document production and that as such, he is not protected by §1985(2).

In fact Kahn *was* a witness. *His deposition was taken in the Dekalb action.*[4] Prior to the commencement of the Dekalb suit, he had engaged in discussions with Dekalb on behalf of Avnet's DNA subsidiary and its DNA division regarding DNA's ability to give Dekalb adequate assurances of performance of the contract which was the subject of the suit. As the Complaint alleged, this was the critical issue of the lawsuit. (¶15, Appendix D at D-3.) It was also the subject matter of the document Kahn was instructed to destroy and lie about under oath. *See* ¶10 of the Complaint. (Appendix D at D-2.)

Further, as ¶12 of the Complaint pleads (*see* Appendix D at D-3), Kahn was required to sign under oath an affidavit stating that he had supervised the production of documents and that such production was complete, and to answer interrogatories covering the subject matter of the incriminating document which Avnet instructed him to destroy. *See* Rules 33 and 34, Fed.R.Civ.P. Kahn pleaded (¶14) that he was terminated as an employee of Avnet for refusing to testify falsely in a production of documents affidavit and in answering certain Dekalb interrogatories and that Avnet knew or should have known that he would be called as a witness in the Dekalb suit because of his involvement in prelitigation negotiations with the plaintiff in that suit (¶15). *See also* ¶16.

In *Chahal*, the court rejected Avnet's narrow and grudging interpretation of the word "witness." The court made it clear that §1985 should be interpreted liberally and that the protections of §1985 apply to "potential" witnesses as well as to those who actually appear and testify in court. *Id.* at 24. The Third Circuit agreed with such a broad interpretation and rejected Avnet's "crabbed and unwarranted reading of the statute" in *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 355 (3d Cir. 1986), in a holding that would clearly apply to Kahn:

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4 When Kahn was asked whether his termination related to the DeKalb litigation, Avnet's attorney strenuously objected on the ground of attorney-client privilege. (JA 167, 169.)

> [W]e think that a person asked to provide discovery in such a case, regardless of where or in what form, is for these purposes a witness "in" the court. Indeed, the statute distinguishes between being deterred from "attending such court' and from "testifying to any matter pending therein." As a policy matter, we think the statute's less than pellucid language should be read with a view to the fact that pretrial proceedings in 1870 did not have the importance they have today. Because cases can be won or lost, or their value substantially diminished, as a result of intimidation that affects witnesses' willingness or ability to provide discovery, we hold that the statute applies."

In contrast, not one of the reported cases cited by Avnet for the proposition that only *live* testimony *in court* is covered by §1985(2) actually stands for that proposition.

C. Kahn Suffered "Injury" Pursuant to §1985

Avnet suggests that because under New York law, Kahn was an at will employee who could be dismissed for any reason, he was not "injured" pursuant to §1985. This is akin to suggesting that a New York employer can discharge an employee in an act of racial discrimination since the employee was "at will" and could be discharged "for any reason, or for no reason at all." Clearly, New York's law of wrongful discharge does not pre-empt federal civil rights statutes.[5] If Kahn was threatened with discharge and ultimately discharged from his job as part of a conspiracy to intimidate or deter him from testifying truthfully, he suffered injury cognizable under §1985(2). *See also Tims*

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[5] Indeed, the modern New York case relied upon by Avnet for the doctrine of at will employment nevertheless held that the plaintiff could state a claim for age discrimination. *See Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 264 N.Y.S.2d 232 (1983).

v. Board of Education of McNeil, Arkansas, 452 F.2d 551, 552 (8th Cir. 1971)(at will employment doctrine does not permit discharge of employee on grounds violative of constitutional or legal rights); *Wynn v. Boeing Military Airplane Co.*, 595 F. Supp. 727, 729 (D. Kans. 1984)(same).

Even if Avnet were correct and Kahn could not recover for lost wages due to his "at will" status, damages recoverable under §1985(2) are not limited to such economic damages. §1985 provides for damages to one who is injured "in his person or property." §1985(3). Damages recoverable include mental pain and suffering. *Bueno v. City of Donna*, 714 F.2d 484, 496 n.11 (5th Cir. 1983). Kahn alleged both types of damages. *See* ¶17 of the Complaint (Appendix D at D-4).

III
The Civil Rights Claim Was Central To Kahn's Case

The "Counterstatement of the Case" in Avnet's brief makes it appear that Kahn's civil rights claim was a secondary element of this action. In fact, it was central to his case. This is demonstrated not only by the fact that it was pleaded as the first claim for relief, but also by the fact that the central theme of Kahn's case was that he was threatened with discharge, and ultimately discharged, unless he destroyed evidence and testified falsely regarding the evidence.

While many jurisdictions would recognize such conduct by Avnet as a basis for a claim of wrongful discharge, New York adheres to a strict doctrine of at will employment. *See Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 264 N.Y.S.2d 232 (1983). Thus, the §1985(2) claim provided the most favorable basis for relief.

Because of New York's refusal to recognize the doctrine of wrongful discharge and because of strategic changes of position taken by Avnet at trial and rulings by the District Court, the jury was never able to learn of the instructions to Kahn to destroy evidence and testify falsely. In fact, although Kahn's counsel advised the jury in his opening statement that the evidence would reveal such conduct by Avnet, the District Court prevented Kahn from presenting such evidence. Thus, the jury was left with the false impression that Kahn had *no* evidence of what was

the central theme of his case. Moreover, because Avnet decided, at trial, to admit that Kahn was not discharged for cause (since New law permits discharge without cause), Avnet effectively precluded Kahn from presenting any evidence as to the reasons for his discharge (including the threats and pressure to testify falsely and destroy evidence).

The result was that the jury was able to view only half of the picture of events underlying the suit. It was natural for the jury to reject Kahn's claim that Avnet's president had orally agreed that he would not be discharged except for cause (a claim that, in any event, was not Kahn's central theory of relief) because the jury was not able to hear all of the evidence. Moreover, Avnet was able to argue to the jury, apparently successfully, that Kahn had recently fabricated his claim, because Kahn was not permitted to testify about the claims he had made, immediately after his discharge, that he was being fired for refusing to destroy evidence.

Avnet's brief also suggests that there is nothing to Kahn's §1985(2) claim because Avnet did, in fact, "voluntarily" produce the "smoking gun" document in the Dekalb suit after Kahn was discharged. Avnet omits to note that the production was pursuant to a discovery order; thus it was hardly voluntary. Moreover, the evidence which Kahn would have presented, had the District Court permitted him, would have demonstrated that it was *because of* Kahn's discharge, and the resulting controversy among Avnet's defense counsel in the Dekalb suit, that the decision was made to produce the document.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 29, 1988

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on July 29, 1988, I served the within *Reply Brief In Support of Petition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court One First Street, N.E. Washington, D.C. 20543 (Original + 40 Copies)	George Graff, Esq. Milgrim, Thomajan & Lee, P.C. 405 Lexington Avenue New York, New York 10174 (3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 29, 1988, at Los Angeles, California.

Claude A. Lagardere
(Original signed)

OFFICIAL SEAL
SALLY H JONES
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires MAY 22, 1990